> The direction of Article I is that *Congress* shall have the power to promote the progress of science and the useful arts. When, as here, the Constitution is permissive, the sign of how far Congress has chosen to go can come only from Congress.

Sony Corporation of America v. Universal City Studios, 464 U.S. 417, 456 (1984) quoting Deepsouth Packing Co. v. Laitrom Corp., 406 U.S. 518 (1972). "As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product." Sony, 464 U.S. at 429.

"[W]hether any specific category of 'Writings' is to be brought within the purview of the federal statutory scheme is left to the discretion of the Congress." Goldstein v. California, 412 U.S. 546, 562 (1973). Moreover, it is manifestly within the scope of Congress' power to determine the degree to which copyright protection should apply to television broadcasts that are re-transmitted through newly developed technological media, such as cable and satellite. As the Supreme Court explained in Sony:

> Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.

464 U.S. at 431.

In enacting copyright legislation, Congress need not ignore the impact of such legislation on the nation's economy. The task of defining the scope of copyright "involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interests in the free flow of ideas, information and commerce on the other hand[.]" Sony, 464 U.S. at 429. "The history of federal copyright statutes indicates that the Congressional determination to consider specific classes of writings is dependent, not only on the character of the writing, but also on the commercial importance of the product to the national economy." Goldstein v. California, 412 U.S. at 562.

The statute at issue here reasonably "accommodate[s] various competing considerations of copyright, communications, and antitrust policy," which, as the Supreme Court has held, is properly a "job [that] is for Congress." Fortnightly Corporation v. United Artists Television, 392 U.S. 390, 401 (1968). The statutory copyright license created by SHVIA fosters competition between the satellite and cable industries, avoids any adverse effect on the broadcast industry, and, at the same time, facilitates the ability of satellite carriers to retransmit television broadcasts, "thereby allowing the public to benefit by the wider dissemination of works carried on television broadcast signals." Capital Cities Cable v. Crisp, 467 U.S. 691, 710 (1984).

As the Supreme Court observed in its discussion of the analogous compulsory copyright license created for the cable industry: "In devising this system, Congress has clearly sought to further the important public purposes framed in the Copyright Clause, U.S. Const., Art. I, § 8, cl. 8, of rewarding the creators of copyrighted works and of 'promoting the broad public availability of literature, music, and the other arts.'" Capital Cities, 467 U.S. at 710, quoting in part Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975). The statutory license created by SHVIA serves that same purpose, and is therefore well within Congress' authority under the Copyright Clause.

B. Congress Is Empowered By The Commerce Clause To Regulate Satellite Transmissions of Television Broadcasts In A Manner That Promotes Competition

Even if the carriage requirements at issue here were beyond the scope of Congress' power under the Copyright Clause, as plaintiffs allege, they are clearly a valid exercise of Congress' power under the Commerce Clause. U.S. Const., Art. I, § 8, cl. 3.[7] In United States v. Lopez, 514 U.S. 549, 558 (1995), the Supreme Court identified "three broad categories of activity that Congress may regulate under its commerce

[7] The Commerce Clause provides an independent source of constitutional authority for congressional enactments that might otherwise be beyond the scope of powers conferred upon Congress by the Copyright Clause. United States v. Moghadam, 175 F.3d 1269, 1277-1282 (11th Cir. 1999), cert. denied, 120 S.Ct. 1929 (2000); Authors League of America v. Oman, 790 F.2d 220, 224 (2d Cir. 1986); Fairway Foods v. Fairway Markets, 227 F.2d 193, 196-197 (9th Cir. 1955).

power." Id. "First, Congress may regulate the channels of interstate commerce. * * * Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce. * * * Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, [citation omitted], i.e., those activities that substantially affect interstate commerce." Id.

There can be little question that satellite transmissions of television broadcasts are a "channel[] of interstate commerce" that Congress is empowered to regulate under the Commerce Clause. The term "channel of interstate commerce" includes both "television and radio broadcast frequencies," Gibbs v. Babbitt, 214 F.3d 483, 490-491 (4th Cir. 2000), quoting in part United States v. Miles, 122 F.3d 235, 245 (5th Cir. 1997), and "satellite communication frequencies." Miles, 122 F.3d at 245. Nor can there be any doubt that retransmission of television broadcasts "substantially affects" interstate commerce. See United States v. Southwestern Cable Co., 392 U.S. at 169 ("To categorize [cable operators'] activities as intrastate would disregard the character of the television industry, and serve merely to prevent the national regulation that is not only appropriate but essential to the efficient use of radio facilities.") (internal quotations omitted); see F.C.C. v. League of Women Voters, 468 U.S. 364, 376 (1984) ("Congress, acting pursuant to the Commerce Clause, has power to regulate the use of this scarce and valuable resource [of broadcast communication])." For both reasons, Congress is clearly empowered to regulate satellite transmissions of television broadcasts under the Commerce Clause.

II. THE STATUTORY COPYRIGHT LICENSE CREATED BY SHVIA DOES NOT IMPLICATE THE FIRST AMENDMENT

As discussed above, a critical distinction between the carriage obligations in SHVIA and the cable "must-carry" provisions upheld by the Supreme Court in Turner II, 520 U.S. 180 (1997) is that SHVIA does not, of its own force, *impose* any restriction on what stations or programs plaintiffs may carry. Following passage of the statute, "[s]atellite carriers remain free to carry any programming for which they are able to acquire the property rights." H.R. Conf. Rep. No. 104-464 (D. Ex. 103) at 101. Similarly, SHVIA does not

require carriage of broadcast stations; instead, it "allows a satellite carrier to choose whether to incur the must-carry obligation in a particular market in exchange for the benefits of the local statutory license." Id.

Indeed, SHVIA expands plaintiffs' editorial discretion by permitting plaintiffs to retransmit television broadcasts that would otherwise be subject to copyright restrictions. Section 1002 of SHVIA creates a new statutory copyright license that permits plaintiffs to retransmit local television broadcasts, and relieves plaintiffs of any obligation to make royalty payments to the owners of copyrights in the various television programs included in the broadcast. 17 U.S.C. § 122(a) and (c). The license is granted only if plaintiffs comply with regulations governing carriage of television broadcast signals. Id., §122(a)(2). The relevant carriage provisions, in turn, apply only if plaintiffs choose to provide television broadcast signals "under section 122 of title 17" (i.e., pursuant to the statutory copyright license created by SHVIA). 47 U.S.C. § 338(a).

Thus, the statute leaves the decision as to whether to invoke the statutory copyright license, and thereby incur the carriage obligations associated with that license, entirely in the hands of plaintiffs. As the Conference Committee explained:

> Rather than require carriage of stations in the manner of cable's mandated duty, this Act allows a satellite carrier to choose whether to incur the must-carry obligation in a particular market in exchange for the benefits of the local statutory license. * * * Satellite carriers remain free to carry any programming for which they are able to acquire the property rights. The provisions of this Act allow carriers an easier and more inexpensive way to obtain the right to use the property of copyright holders when they retransmit signals from all of a market's broadcast stations to subscribers in that market. The choice whether to retransmit those signals is made by carriers, not by the Congress.

H. R. Conf. Rep. No. 104-464 (D. Ex. 103) at 101 (1999).

As the Supreme Court explained in National Endowment for the Arts v. Finley, 524 U.S. 569 (1998), "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." Id. at 588, quoting Maher v. Roe, 432 U.S. 464, 475 (1977). Thus, for example, "even where the Constitution prohibits coercive

governmental interference with specific rights, it 'does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.'" Lyng v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, 485 U.S. 360, 369 (1988), quoting in part Regan v. Taxation with Representation of Washington, 461 U.S. 540, 550 (1983). Similarly, "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." Rust v. Sullivan, 500 U.S. 173, 193 (1991), quoting Regan, 461 U.S. at 549.

The decisions in National Endowment, Regan, Lyng, and Rust all involved financial subsidies. However, the distinction between a legal obligation that is *imposed* through the coercive power of the government and a duty which is *voluntarily assumed* has been recognized in First Amendment challenges arising in a variety of other contexts. For example, the privilege of government employment may be conditioned on adherence to restrictions on speech that would be proscribed by the First Amendment if they were imposed on non-employees. As a plurality of the Supreme Court explained in Waters v. Churchill, 511 U.S. 661, 672 (1994), "though a private person is perfectly free to uninhibitedly and robustly criticize a state governor's legislative program, we have never suggested that the Constitution bars the governor from firing a high-ranking deputy for doing the same thing." The Court reaffirmed this same principle in Connick v. Myers, 461 U.S. 138, 146 (1983):

> When an employee's speech "cannot fairly be characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge. When employee expression cannot be fairly considered as relating to any matter of political, social or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary."

In Rust v. Sullivan, the Court rejected a First Amendment claim by a private grantee who complained that limitations on the use of federal funds were "impermissible because they condition the receipt of a benefit . . . on the relinquishment of a constitutional right, the right to engage in abortion advocacy and counseling." Id. at 196. The plaintiffs also claimed that the regulations "abridge the free speech rights of the grantee's staff." Id. at 198. In dismissing the latter claim, the Court explained that:

> Individuals who are *voluntarily* employed for a Title X project must perform their duties in accordance with the regulation's restrictions on abortion counseling and referral. * * * The employees' freedom of expression is limited during the time that they actually work for the project; *but this limitation is a consequence of their decision to accept employment in the project*, the scope of which is permissibly restricted by the funding authority.

Id. at 198-199 (emphasis supplied).

Similarly, in Cornelius v. NAACP Legal Defense and Educational Fund, 473 U.S. 788, 806-811 (1985), the Court held that the government may constitutionally restrict the availability of a "non-financial benefit" (eligibility to participate in the federally sponsored Combined Federal Campaign) to charitable organizations that solicit funds solely for traditional health and welfare activities and do not attempt to influence the outcome of political elections or the determination of public policy. This limitation was constitutionally permissible notwithstanding the fact that, consistent with the First Amendment, the government could not have *imposed* those same limitations on the organizations.

As the above decisions make clear, the constraints imposed by the First Amendment are substantially less demanding in circumstances where the obligation that is alleged to violate the First Amendment arises not from a governmentally imposed regulation, but instead from a voluntary undertaking by the recipient of a governmental benefit. That is precisely the situation which exists here. Plaintiffs have the same right to refuse carriage of a local television broadcast station today as they did before SHVIA was passed. Similarly, plaintiffs retain the same "editorial discretion" today as they had prior to SHVIA - - they are permitted to retransmit any television broadcast they choose so long as they obtain the necessary authorization from the owner(s) of copyrights in those programs.

Because the decision to invoke SHVIA's copyright license is entirely voluntary, the statute in no sense "coerces" carriage of local broadcast stations. Instead, it merely encourages carriage of all local broadcast stations in each market by creating an "easier and more inexpensive way" for satellite carriers to obtain the right to use the property of copyright holders. Mere "encouragement" of activity "consonant with legislative policy" does not violate the First Amendment. National Endowment, 524 U.S. at 587-588;

see also Regan, 461 U.S. at 550 ("[c]onstitutional concerns are greatest when the state attempts to impose its will by force of law . . ., its power to encourage actions deemed to be in the public interest is necessarily far broader") (internal quotations omitted).

Concomitantly, withholding a statutory copyright license for failure to comply with the terms of that license does not abridge plaintiffs' First Amendment rights of free speech or free association merely because it "makes it harder" for plaintiffs to exercise those rights. Lyng v. International Union, 485 U.S. at 368; see Los Angeles Police Department v. United Reporting Publishing Corporation, 528 S.Ct. 32 (1999) (police department's refusal to disclose addresses of recent arrestees without sworn declaration that addresses would not be sold does not abridge the First Amendment rights of publisher that provides names and addresses of recently arrested individuals to its customers). Plaintiffs may choose to accept the benefits of the statutory copyright license or they may instead seek to secure the right to retransmit the broadcasts directly from copyright owners. As the Supreme Court observed in an analogous context: "We have never held that the Government violates the First Amendment simply by offering that choice." Rust v. Sullivan, 500 U.S. at 199 n. 5.

This is not to say that the Government may impose *any* condition whatsoever on a governmental benefit. To the contrary, the Supreme Court has repeatedly emphasized that the Government may not "leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints." National Endowment, 524 U.S. 569, 587 (1998); see also Regan, 461 U.S. at 548, quoting Cammarano v. United States, 358 U.S. 498, 513 (1959) ("the case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas."). Most recently, in Legal Services Corp. v. Velazquez, 531 U.S. 533, 121 S.Ct. 1043, 1052 (2001), the Court emphasized that: "Where private speech is involved, even Congress' antecedent funding decision *cannot be aimed at the suppression of ideas* thought inimical to the Government's own interest." (Emphasis added). SHVIA, of course, does not discriminate based on viewpoint. Moreover, the statute is not even arguably

aimed at the suppression of ideas. Therefore, it raises none of these concerns.

If plaintiffs choose not to invoke the copyright license created by SHVIA, they "remain free to carry any programming for which they are able to acquire the property rights." H. R. Conf. Rep. No. 104-464 (D. Ex. 103) at 101. If plaintiffs are unable or unwilling to obtain those rights, any limitation on their lawful authority to retransmit broadcasts is but a necessary consequence of the copyright laws, and does not violate the First Amendment. Harper & Row, Publishers v. Nation Enterprises, 471 U.S. 539, 555-560 (1985); United Video v. Federal Communications Commission, 890 F.2d 1173, 1191 (D.C. Cir. 1989) ("In the present case, the petitioners desire to make commercial use of the copyrighted works of others. There is no first amendment right to do so."); Schnapper v. Foley, 667 F.2d 102, 114 (D.C. Cir. 1981) (First Amendment does not require "judicial creation of a compulsory licensing scheme in derogation of the law of copyright as passed by Congress"); see Zacchini v. Scripps-Howard Broadcasting Company, 433 U.S. 562, 574-575 (1977) ("Wherever the line . . . is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent.").

III. SHVIA'S CARRIAGE PROVISIONS ARE FULLY CONSISTENT WITH THE REQUIREMENTS OF THE FIRST AMENDMENT

As we demonstrated in Point II above, it is only with considerable imagination that carriage obligations that are voluntarily assumed by satellite carriers to advance their economic and business interests can be viewed as a governmentally imposed "burden" on speech. Assuming, arguendo, however, that SHVIA could be conceptualized as a burden on plaintiffs' speech sufficient to implicate the First Amendment, it would easily survive constitutional scrutiny.

A. Plaintiffs Have No First Amendment Right To Monopolize DBS Broadcast Frequencies

As the D.C. Circuit has held, because the spectrum available for DBS transmissions is limited, and because it has the potential for interference similar to other portions of the electromagnetic spectrum,

regulations of satellite transmissions "should be analyzed under the same relaxed standard of scrutiny that the court has applied to the traditional broadcast media." Time Warner Entertainment v. Federal Communications Commission, 93 F.3d 957, 975 (D.C. Cir. 1996), reh'g denied, 105 F.3d 723 (D.C. Cir. 1997). In Turner I, 512 U.S. at 637-638, the Supreme Court recognized that it has, in the past, applied a "less rigorous standard of First Amendment scrutiny" to the broadcast medium. The Court emphasized that the justification adopted by the Court in its prior decisions for the "distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium." 512 U.S. at 637.

As plaintiffs concede in their Complaint, the spectrum available for DBS broadcasts is limited. "Satellite carriers can use only a limited frequency band, or 'spectrum,' to deliver programming to subscribers" and "the vast majority of satellite television service is delivered to subscribers over what is known as the Broadcasting Satellite Service ('BSS') spectrum at 12.2 to 12.7 gigahertz," which is "also referred to as High-Powered DBS" (Compl., ¶ 23). The High-Powered DBS transmissions allow the subscriber to use a smaller antenna or dish, and "is less subject to interference from weather and other atmospheric conditions than lower power signals." Id. In addition, if two DBS providers "were to attempt to transmit over the same frequency in the same locale, they would interfere with one another's signals, so that neither could be heard at all." Turner I, 512 U.S. at 637; see Declaration of Roger J. Rusch ("Rusch Declar.") (D. Ex. 4), ¶ 9 ("Because the signal is transmitted nationwide, the satellite carrier is prevented from using the same frequency to transmit the signal of a different local station due to the resulting interference.").

Only three of eight orbital slots available to the United States, which are located at 101, 110 and 119 degrees West Longitude, "are capable of delivering High-Powered DBS signals to subscribers within the entire continental United States." Compl., ¶ 24. "Directv and Echostar are the two dominant DBS providers in the United States, and collectively control all of the spectrum at these three locations." Rusch Declar. (D. Ex. 4) ¶ 4 (emphasis added). Directv is licensed to use 46 of the 96 frequencies in these three

orbital slots, and Echostar is licensed to use all of the remaining 50 frequencies. Id., ¶ 6; Compl., ¶¶ 26-27. Because plaintiffs control all of the spectrum at these locations, they also control which television channels will be carried on DBS transmissions.[8]

Under the relaxed standard of review that has been applied by the Supreme Court in these circumstances, "[i]t is the right of the viewers and listeners, not the right of broadcasters, which is paramount." Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367, 390 (1969). Under that standard, because "[t]he First Amendment confers no right on licensees to prevent others from broadcasting," id. at 391, the carriage obligations at issue here (in which plaintiffs are merely voluntarily incurring an obligation to permit others to broadcast) do not violate the First Amendment. Thus, the statute challenged here would be a constitutionally permissible regulation of direct broadcast satellite transmissions even if it did not satisfy the more rigorous standards applied by the Supreme Court to regulations governing cable operators in Turner I and Turner II.[9]

As the Supreme Court noted in Turner I: "Although courts and commentators have criticized the

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[8] Given the bandwidth of the spectrum available, "32 frequencies are available for DBS broadcasts at each orbital location." Rusch Declar. (D. Ex. 4) ¶ 4; Compl., ¶ 25. In the satellites that are currently in use by Directv and Echostar, each frequency is used to retransmit an average of 10 to 11 television transmissions for a total of 320 to 352 television channels at each orbital location. Rusch Declar. (D. Ex. 4) ¶ 8. Plaintiffs may reuse DBS frequencies (and thereby increase the number of local channels that may be carried) by targeting the signals at smaller geographic areas through the use of spot beams. Id., ¶¶ 11-18. However, to prevent interference, it is necessary to avoid the use of the same set of frequencies in adjacent beams. Id., ¶ 26. Therefore, no other individual or entity is licensed to use these frequencies for DBS transmissions because the two signals would interfere with one another.

[9] Cable systems (unlike plaintiffs here) do not utilize scarce electromagnetic spectrum. Consequently, in Turner I, the Supreme Court concluded that its broadcast cases were inapposite "because cable television does not suffer from the inherent limitations that characterize the broadcast medium." 512 U.S. at 638-639. The Court explained further that, given advances in technology, "there may be no practical limitation on the number of speakers who may use the cable medium[,] [n]or is there any danger of physical interference between two cable speakers attempting to share the same channel." Id. at 639. Here, the contrary is true. Regardless of the number of channels that can be carried by an individual DBS provider on each frequency, governmental licensing and regulation remains critical to the successful use of scarce DBS spectrum because, without such regulation, there is a significant danger of physical interference between two speakers attempting to share the same frequency, such that "neither could be heard at all." See Turner I, 512 U.S. at 637.

scarcity rationale since its inception, [the Court has] declined to question its continuing validity as support for the [Court's] broadcast jurisprudence." 512 U.S. at 638. In any event, as we demonstrate below, SHVIA satisfies even the more stringent standards of Turner I and Turner II.

B. SHVIA's Carriage Obligations Are Content-Neutral Provisions Which Do Not Warrant Strict First Amendment Scrutiny

Like the "must-carry" rules at issue in Turner I, SHVIA's provisions - - which create a benefit in the form of a copyright license and, at the same time, include carriage obligations that are voluntarily assumed as one of the terms of that license - - "impose burdens and confer benefits without reference to the content of speech." Turner I, 512 U.S. at 643. Consequently, SHVIA does not raise any of the types of First Amendment concerns which traditionally warrant strict scrutiny by the courts.

Strict First Amendment scrutiny is reserved for laws "that suppress, disadvantage, or impose differential burdens upon speech because of its content" or "compel speakers to utter or distribute speech bearing a particular message." Turner I, 512 U.S. at 642. "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." Id. at 643. The "principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." Turner I, 512 U.S. at 642, quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

Nothing in SHVIA remotely suggests that the carriage provisions at issue here were adopted because of agreement or disagreement with any message or viewpoint. The applicability of SHVIA's carriage provisions turns on: (1) whether plaintiffs choose to retransmit local television broadcasts within a particular geographic market, and (2) whether plaintiffs have secured authorization of the owners of copyrights in the programs carried or whether plaintiffs instead choose to invoke the statutory copyright license embodied in 17 U.S.C. § 122. See 47 U.S.C. § 338(a)-(c). Both factors are wholly unrelated to the

content of plaintiffs' speech, as well as the content of any programming they choose to offer.[10]

Nor can it be credibly argued that the "manifest purpose" of SHVIA "is to regulate speech because of the message it conveys." Turner I, 512 U.S. at 642. The overriding purpose of SHVIA is to promote effective "competition in the marketplace for delivery of multichannel video programming" by providing satellite carriers with "a statutory scheme for licensing television broadcast programming similar to that of the cable industry." H. R. Conf. Rep. No. 104-464 (D. Ex. 103) at 92 (1999); see also, id. at 101 ("The proposed licenses place satellite carrier[s] in a comparable position to cable systems, competing for the same customers.").[11] A related objective of the statute is to promote widespread dissemination of information from a multiplicity of sources by encouraging, on a market by market basis, retransmissions by satellite of the programming of local television broadcast stations to subscribers who reside in the local markets of those stations. Id. at 92.

At the same time, Congress recognized that statutory copyright licenses are "in derogation of the

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[10] The applicability of SHVIA's carriage provisions turns, in part, on which broadcast television station plaintiffs choose to carry. However, they do so based solely upon the geographic location of the station within a particular media market, and without regard to the particular message or viewpoint conveyed in the station's programming. "[A] differential burden on speakers is insufficient by itself to raise First Amendment concerns . . . ." Leathers v. Medlock, 499 U.S. 439, 452 (1991). Rather, "speaker-based laws demand strict scrutiny when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)." Turner I, 512 U.S. at 658. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages and not others." Ward v. Rock Against Racism, 491 U.S. at 791.

[11] See also, e.g., 145 Cong. Rec. H2318 (daily ed. April 27, 1999) (statement of Rep. Tauzin) ("The bill today we are considering is designed to put satellite television providers on that competitive equal footing ..."); 145 Cong. Rec. S5777 (daily ed. May 20, 1999) (statement of Sen. Leahy) ("This bill will allow satellite TV providers to compete directly with cable and will give consumers a choice.") and S5778 ("I want satellite TV to directly compete with cable TV. The only way they can do that is to be able to offer local TV stations."); 145 Cong. Rec. H11813 (daily ed. Nov. 9, 1999) (statement of Rep. Conyers) ("The most important change the bill makes is allowing satellite carriers to offer local-to-local service. ... By eliminating this restriction, we will allow the satellite companies to provide more viable competition to cable, which will enhance consumer choice and services."); and id. at H11817 (statement of Rep. Oxley) ("The measure before us permits satellite television providers to deliver local broadcast channels to local viewers ... This will provide a major boost to satellite as a competitor to cable television.").

exclusive property rights granted by the Copyright Act to copyright holders." Id. at 92. Therefore, Congress sought to "act as narrowly as possible to minimize the effects of the government's intrusion on the broader market in which the affected property rights and industries operate." Id. Toward that end, Congress sought to assure that the licensing scheme "hews as closely as possible" to "the national network structure, which grants exclusive territorial rights to programming in a local market to local stations either directly or through affiliation agreements." Id. at 92.[12]

The carriage provisions are likewise designed to "minimize the effects of the government's intrusion on the broader market" by ensuring that the copyright license created by SHVIA cannot be used in a manner which would adversely affect over-the-air broadcasters and the viewers who rely upon the availability of free over-the-air broadcasts. The statute is "intended to preserve free television for those not served by satellite or cable systems and to promote widespread dissemination of information from a multiplicity of sources." Id. at 101. Congress was concerned that, in the absence of a carriage obligation, "satellite carriers would carry the major network affiliates and few other signals [and] [n]on-carried stations would face the same loss of viewership Congress previously found with respect to cable non-carriage." Id.

As the Supreme Court has explicitly held, none of these objectives "is related to the 'suppression of free expression' [citation omitted], or to the content of any speakers' messages." Turner I, 512 U.S. at 662. Instead, they reflect that Congress sought to enhance the ability of satellite carriers to compete with cable operators without causing any harmful consequence to other affected parties. The objectives of the statute therefore have nothing whatsoever to do with the ideas or messages that either plaintiffs or any other affected parties wish to convey.

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[12] As the Conference Committee's report notes, Congress sought to "protect[] and foster[] the system of television networks" by "structur[ing] the copyright licensing regime for satellite to encourage and promote retransmissions by satellite of local television broadcast stations to subscribers who reside in the local markets of those stations." Id. At the same time, Congress declined to authorize use of the license for "importation of distant or out-of-market network stations in derogation of the local stations' exclusive right . . . to show the works . . . ." Id. at 93.

Finally, for the reasons identified in Turner I, the "design and operation" of SHVIA's carriage provisions also confirm that the purposes underlying the statute are "unrelated to the content of speech." Id. at 649. SHVIA confers carriage rights on all full-power broadcasters located in any geographic market in which they are applicable, "irrespective of the content of their programming." Id. The comments of the Supreme Court with respect to the "must carry" requirements applicable to cable operators apply equally to SHVIA's requirements with respect to satellite carriers:

> They do not require or prohibit the carriage of particular ideas or points of view. They do not penalize cable operators or programmers because of the content of their programming. They do not compel cable operators to affirm points of view with which they disagree. They do not produce any net decrease in the amount of available speech. And they leave cable operators free to carry whatever programming they wish on all channels not subject to must-carry requirements.

Turner I, 512 U.S. at 647. Thus, like the "must-carry" requirements at issue in Turner I, the carriage obligations associated with the statutory license created by SHVIA are "content-neutral."

C. SHVIA Advances Important Governmental Interests Unrelated To The Suppression of Free Speech

"A content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary." Turner II, 520 U.S. at 189. As we demonstrate below, SHVIA is fully consistent with these standards.

1. SHVIA's objectives are important governmental interests

There can be no serious dispute that the objectives of SHVIA are important governmental interests that are unrelated to the suppression of free speech. As set out above, SHVIA is designed to serve several interrelated objectives, including: (a) promoting effective "competition in the marketplace for delivery of multichannel video programming" by providing satellite carriers with "a statutory scheme for licensing television broadcast programming similar to that of the cable industry;" H. R. Conf. Rep. No. 104-464 (D. Ex. 103) at 92 (1999); (b) promoting widespread dissemination of information from a multiplicity of

sources; (c) "minimizing the effect of the government's intrusion" on the affected markets and industries by ensuring that the licensing scheme operates in a manner which takes account of the structure of the broadcast industry, id.; and (d) ensuring that the new statutory copyright license does not adversely affect over-the-air broadcasters and the viewers who rely upon the availability of free over-the-air broadcasts.

As the Supreme Court found in Turner I, "the Government's interest in eliminating restraints on competition is always substantial, even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment." 512 U.S. at 664; accord, Turner II, 520 U.S. at 190. Here, the Government's interest is particularly compelling because SHVIA seeks to eliminate an unfair competitive advantage in favor of cable operators that stemmed not from the action of any private party, but instead from a disparity in the Government's own copyright licensing scheme.

Similarly, "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment." Turner I, 512 U.S. at 663. Plaintiffs' evident contention that the government's interest in ensuring public access to diverse sources of information can be served adequately through carriage of the major networks has been rejected by both the Congress and the Supreme Court. As the Supreme Court held in Turner II:

> To the extent the appellants question the substantiality of the Government's interest in preserving something more than a minimum number of stations in each community, their position is meritless. It is for Congress to decide how much local broadcast television should be preserved for noncable households, and the validity of its determination "does not turn on a judge's agreement with the responsible decisionmaker concerning . . . the degree to which [the Government's] interests should be promoted."

520 U.S. at 193, quoting in part Ward v. Rock Against Racism, 491 U.S. at 800.

The Supreme Court has also repeatedly recognized the critical "importance of local broadcasting outlets." Turner I, 512 U.S. at 663. "Despite the growing importance of cable television and alternative technologies, 'broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population.'" Turner II, 520 U.S. at 190, quoting in part Turner I, 512 U.S. 663; United

States v. Southwestern Cable Company, 392 U.S. at 177. Given the Government's "interest in maintaining the local broadcast structure," Turner I, 512 U.S. at 663, the importance of Congress' objective to "minimize the effects of the government's intrusion" on the affected markets and industries, and to ensure that the new licensing scheme does not adversely affect over-the-air broadcasters, cannot be seriously questioned.

Finally, as the Supreme Court held in Turner II, "'protecting noncable households from loss of regular television broadcasting service due to competition from cable systems' is an important federal interest." 520 U.S. at 190. Consequently, Congress' objective of preserving free television for those not served by either satellite or cable systems is necessarily also an important governmental interest

2. The copyright licensing scheme created by SHVIA effectively furthers the Government's interests

Apart from the importance of the Government's asserted interests, the Court must consider whether the provisions challenged here "were designed to address a real harm, and whether those provisions will alleviate it in a material way." Turner II, 520 U.S. at 195. In reviewing this issue, the "courts must accord substantial deference to the predictive judgments of Congress." Id., quoting Turner I, 512 U.S. at 665. The Court's "sole obligation is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." Turner II, 520 U.S. at 195 (internal quotations omitted). "If the legislative conclusion was reasonable and supported by substantial evidence . . . summary judgment for [the government] is appropriate regardless of whether the evidence is in conflict." Id. at 211 (emphasis supplied). As we establish below, Congress' judgment that enactment of SHVIA was "necessary to address a real harm," and that its provisions would alleviate that harm "in a material way," is both reasonable and supported by substantial evidence.

a. Promotion of competition

As a threshold matter, it is important to emphasize that the principal "harm" that SHVIA is designed to address and alleviate is what was perceived by Congress to be an unfair competitive

disadvantage which worked to the detriment of satellite carriers such as plaintiffs. That competitive disadvantage arose from a disparity in the copyright licensing schemes applicable to cable and satellite operators. By virtue of that disparity, cable operators were able to take advantage of a copyright license to retransmit local television broadcasts, while satellite companies were not able to do so.

Thus, the harm that led to the passage of SHVIA differs substantially from the harm addressed by the cable must-carry requirements at issue in Turner I and Turner II. SHVIA was not enacted to address a pre-existing competitive threat to the viability of local broadcasters. Nor was it intended to eliminate or curtail the effects of any pre-existing monopolistic or anti-competitive practice by satellite carriers. Quite to the contrary, one of the principal objectives of SHVIA is to enhance the ability of satellite carriers to compete with the cable industry.[13]

Instead, SHVIA was designed to eliminate a disparity in the copyright licensing scheme which placed satellite carriers at a competitive disadvantage. Plaintiffs can hardly suggest that the harm that the statute is designed to address is not "real" as they uniformly testified in hearings before the Congress that elimination of the disparity in the copyright licensing scheme was essential to promote competition by placing satellite carriers on an "equal footing" with cable companies. See discussion, supra, at 4 n. 2. As such, plaintiffs' complaint and the source of their objections lies not with the existence of the harm which led to passage of the SHVIA, but instead with the remedy that Congress adopted to address that harm.

In creating legislation that would promote competition, Congress concluded that "it is important that the satellite industry be afforded a statutory scheme for licensing television broadcast programming similar to that of the cable industry." H.R. Conf. Rep. No. 104-464 (D. Ex. 103) at 92 (1999); id. at 101 ("The proposed licenses place satellite carriers in a comparable position to cable systems, competing for the

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[13] Plaintiffs' attempt to establish that there is no need for SHVIA's carriage provisions because satellite carriers lack monopoly power is therefore misdirected. Because the statute is not intended to redress any anti-competitive practice by satellite carriers, its validity does not turn on the existence or even the threat of such practices.

same customers."). The basis for Congress's conclusion is readily apparent given the source of the problem that Congress sought to rectify. As explained above, the competitive disadvantage that led to the enactment of SHVIA arose from a disparity in the copyright licensing scheme applicable to cable operators and satellite carriers. Congress responded by creating a new statutory licensing scheme that was designed to eliminate that disparity insofar as possible while taking into account "the practical differences between the two industries." H.R. Conf. Rep. No. 104-464 (D. Ex. 103) at 92 (1999).

However, in crafting a legislative scheme designed to create parity between cable and satellite, Congress declined to accept plaintiffs' myopic contention that the copyright license granted to cable operators should be viewed outside of the regulatory context in which it was originally created and continues to be used. Instead, it was Congress's judgment that the copyright license granted to cable operators must be viewed in conjunction with the statutory carriage obligations to which cable operators are subject. Consequently, creation of a copyright license for satellite carriers without any associated carriage obligation would neither eliminate the disparity in treatment, nor place satellite carriers on an "equal footing" with cable operators. For these reasons, SHVIA sought to eliminate any disparity in treatment, and thereby promote fair and even-handed competition, by creating a new copyright licensing scheme that includes carriage provisions that parallel those applicable to the cable industry.

As the Court emphasized in Turner II, "[t]he question is not whether Congress, as an objective matter, was correct" in determining that the licensing scheme created by SHVIA, including the carriage provisions that are a part of that scheme, is necessary to achieve the objectives of the statute. Id. at 211. "Rather the question is whether the legislative conclusion was reasonable and supported by substantial evidence." Id. Congress's conclusion that a competitive disadvantage resulting from a disparity in treatment could be rectified by eliminating that disparity is manifestly reasonable and supported by plaintiffs' own testimony regarding the source of the underlying problem. Indeed, the legislative record is replete with statements by representatives of each of the plaintiffs and others about the critical importance

of placing satellite carriers on an "equal footing" with cable operators so as to foster and promote competition and eliminate the competitive disadvantage created by the prior copyright licensing scheme.[14]

As Dr. Jeffrey Rohlfs explains in his Declaration (hereinafter "Rohlfs Declar.") (D. Ex. 3) at ¶ 47, from an economic standpoint, the use of parallel copyright licensing schemes for cable and DBS suppliers is "an effective means of promoting competition and furthering the goal of reducing the cost to consumers of both cable and satellite service."

> [T]here was compelling economic justification for Congress' making a compulsory license available to DBS suppliers. In the absence of such a license, these operators might be hampered in their contesting for customers' favor in competition with cable system operators, who are afforded a compulsory license.
>
> * * *
>
> By the same token, economic logic also implies that there is a compelling economic justification for Congress' *not* making a compulsory license available to DBS operators on terms substantially more favorable than those offered to cable operators. To do so would afford an artificial competitive advantage to DBS operators and bias the competitive process in their favor on this account. With such favored treatment, their marketplace success would, in part, simply reflect differentially favorable governmental treatment in the form of more favorable license terms of access to copyrighted material.

Rohlfs Declar. (D. Ex. 3) ¶¶ 50-51. Thus, "[i]f Congress were to afford satellite operators a compulsory license with more favorable terms than that afforded cable system operators, that would thwart the ability of competition to function as an effective discovery procedure for identifying efficient suppliers and supply arrangements." Id., ¶ 55. "In particular, had Congress artificially 'sweetened' the satellite compulsory license without imposing any offsetting conditions that economically justify the abrogation of the rights of copyright holders, it would have skewed the efficient operation of the competitive process." Id.

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[14] See House Hearings (1998) (D. Ex. 100) at 6 (Statement of Charles W. Ergen, President and CEO, Echostar Communications Corp.) ("This committee can go a long way to improve the existing copyright law that does not treat satellite broadcasters like Echostar anywhere close to equal footing with cable."); id. at 73 (Statement of James J. Popham, Vice President and General Counsel, Association of Local Television Stations) ("[T]he compulsory license should be structured to establish functional parity among the various competitive multichannel video providers. . . [N]o compulsory license should confer an advantage on one among several competing video providers."); see also discussion, supra, at 4 n. 2.

b. Avoiding adverse effects on the broadcast industry

In addition to furthering Congress's objective of "creat[ing] parity and enhanced competition between the satellite and cable industries," H.R. Conf. Rep. No. No. 104-464 (D. Ex. 103) at 93-94, SHVIA's carriage provisions were also designed to ensure that the new licensing scheme did not resolve one problem only to create another. More specifically, Congress sought to assure that the new copyright licensing scheme, which was being created to foster and promote competition between cable and satellite, does not create any significant collateral adverse effects on local broadcasters and their viewers.

As the Conference Committee explained, Congress had concluded that, "absent must-carry obligations, satellite carriers would carry the major network affiliates and few other signals." Id. at 101. In contrast to the situation in Turner II, the Court need not examine evidence concerning market share and vertical integration to draw an inference about "whether significant numbers of broadcasters will be refused carriage . . . absent must-carry." 520 U.S. at 195, 196-208. The evidence supporting Congress's predictive judgment on this question is overwhelming. As Mr. David Moskowitz, the Senior Vice President and General Counsel of Echostar, acknowledged during hearings before the House Subcommittee on Courts and Intellectual Property, even before SHVIA was enacted, Echostar had already begun offering "local network stations" in a number of markets. *Copyright Compulsory License Improvement Act: Hearing Before the House Subcommittee on Courts and Intellectual Property,* 106th Cong. 33 (1999) ("House Hearing (1999)") (D. Ex. 95) ("In each of these markets we offer the four network stations, and in some cities offer independent stations as well."); see also id. at 77-78. Plaintiffs' actions since SHVIA was enacted definitively establish that Directv and Echostar have both limited local television broadcast service largely to the four major networks. Declaration of Stephanie Campbell, Senior Vice President of Programming, Directv (D. Ex. 10) ¶ 18; Declaration of Michael Schwimmer, Vice President of Programming, Echostar (D. Ex. 14) ¶ 19; see also Compl., ¶ 45 ("[T]here are numerous local television broadcast stations that plaintiffs DIRECTV and Echostar would choose not to carry . . . ."). Thus, there is substantial evidence to support

Congress' predictive judgment that, in the absence of SHVIA's carriage provisions, significant numbers of broadcasters would be refused carriage.

Congress also concluded that "[n]on-carried stations would face the same loss of viewership Congress previously found with respect to cable noncarriage." H.R. Conf. Rep. No. 104-464 (D. Ex. 103) at 101. The effects of noncarriage previously found by Congress were summarized by the Supreme Court in Turner II. 520 U.S. at 208-213. As the Court recounts, "[o]ne broadcast industry executive had explained it this way":

> [A] television station's audience size directly translates into revenue - large audiences attract larger revenues, through the sale of advertising time. If a station is not carried on cable, and thereby loses a substantial portion of its audience, it will lose revenue. With less revenue, the station can not serve its community as well. The station will have less money to invest in equipment and programming. The attractiveness of its programming will lessen, as will its audience. Revenues will continue to decline, and the cycle will repeat.

Id. at 208, quoting Hearing on Competitive Issues at 526-527 (Statement of Gary Chapman). The record before Congress "reflected substantial evidence that stations without cable carriage encountered severe difficulties obtaining financing for operations, reflecting the financial markets' judgment that prospects are poor for broadcasters unable to secure carriage." Turner II, 520 U.S. at 209. As the Court recounts, a cable industry study had "acknowledged that even in a market with significantly below average cable penetration, '[t]he loss of cable carriage could cause a significant decrease in a station's ratings and a resulting loss in advertising revenues.'" Id. at 210. "[F]or a popular station in a major television market, even modest reductions in carriage could result in sizeable reductions in revenue." Id.

As Dr. Rohlfs explains, the potential adverse effects resulting from non-carriage by DBS providers are similar in character. First, it is important to emphasize that DBS providers have significant market power as "gatekeepers" with functional control over which local television broadcast stations will be granted access to roughly 16 percent of American households. Rohlfs Declar. (D. Ex. 3) ¶ 60. As Dr. Rohlfs explains, "[a] particular household may have a choice (among a limited number) of multichannel

suppliers, but a broadcast station usually has no choice but to deal with the multichannel operator actually supplying access to a particular household." Id., ¶ 57. "That leaves the broadcast stations at risk of monopolistic (actually, monopsonistic) exploitation by the multichannel operator." Id. In substance, by refusing carriage, plaintiffs have the ability to prevent local broadcasters from reaching viewers in their service areas, a concern explicitly identified by Congress. H.R. Conf. Rep. No. 104-464 (D. Ex. 103) at 101.

Creation of a copyright licensing scheme which facilitates carriage of only a subset of local broadcast stations in a given market would increase the likelihood that other local broadcast stations in that same market would suffer a loss of viewership. In that regard, "DBS subscribers who do not have a rooftop antenna and who are unwilling or unable to incur the expense of subscribing to both satellite and cable service will not have any effective means of viewing non-carried stations." Rohlfs Declar. (D. Ex. 3) ¶ 72.

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The degree of consumer resistance to the use of antennas is borne out by Echostar's own testimony at the Congressional hearings on SHVIA. See e.g., House Hearing (1999) (D. Ex. 95) at 33 (Statement of David Moskowitz, President and CEO, Echostar Communications Corp.) ("Independent studies and our experience as a company match the conclusions of the FCC: most of the people who walk into a satellite dealer's showroom turn around and walk out because they can't get their local TV channels through DBS.").

"The composite effect of all of these factors is that stations that are not carried by a DBS supplier operate at a competitive disadvantage relative to stations that are carried." Rohlfs Declar. (D. Ex. 3) ¶ 73. Moreover, "the competitive disadvantage would arise precisely because DBS suppliers carried a subset of local stations in the small station's DMA." Id., ¶ 74. "No competitive imbalance would occur if DBS suppliers carried no local stations in a DMA or if they met the carriage obligations of SHVIA." Id.

As Dr. Rohlfs explains, the competitive disadvantage created by plaintiffs' proposed licensing

scheme can reasonably be expected to grow over time. First, giving satellite carriers a statutory copyright license without carriage obligations would provide a stimulus for DBS subscribers not to maintain their outside antennas thereby hindering reception of noncarried stations. Id., ¶ 75.

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most cable customers who migrate to satellite from cable service "have likely already allowed their over-the-air signal reception capability to deteriorate or never had an antenna installed in the first place." Rohlfs Declar. (D. Ex. 3) ¶ 76. Each of these factors would contribute to the loss of viewers by stations not carried by DBS providers. Id., ¶¶ 78-80.

The loss of viewership resulting from non-carriage would, in turn, have predictable adverse consequences on local broadcast stations:

> As viewership of a broadcast station decreases, the advertising revenues of the station decrease directly. Indeed, the percentage decrease in revenues may exceed the percentage decrease in viewership . . . because advertisers generally try to reach as large and as distinct an audience as possible.
>
> * * *
>
> As a station's viewership and revenues decline, the costs that it must pay to license programming are also likely to decline. . . . At the same time, however, the station's other costs – including the cost of programming it produces itself – are subject to no such reductions. As a result, cash flow (revenues less expenses apart from depreciation) tends to decrease at an even faster rate.

Rohlfs Declar. (D. Ex. 3) ¶ 81-82. Thus, the adverse effects of a relatively modest 10 percent reduction in station revenues on a station's cash flow (even with an offsetting reduction in programming expenses) are significant - "a 17 percent reduction of cash flow for WBN affiliates, a 19% reduction for UPN affiliates,

and a 94 percent reduction for PAX affiliates." Id., ¶ 84. "Cash flow of the smallest independents would be wiped out almost twice over." Id.

For all of these reasons, Congress's judgment that SHVIA's carriage provisions were necessary to prevent the new licensing scheme from having an adverse effect on local broadcasters was reasonable and is supported by substantial evidence. As the Supreme Court emphasized in Turner II, the deference owed to Congress's judgment has "special significance, in cases like this one, involving inherent complexity and assessments about the likely interaction of industries undergoing rapid economic and technological change." 520 U.S. at 196. There is no sound reason for departing from that principle here

D. SHVIA Does Not Burden Substantially More Speech Than Necessary To Further The Government's Interests

Because "[c]ontent-neutral regulations do not pose the same "inherent dangers to free expression," they are "subject to a less rigorous analysis, which affords the Government latitude in designing a regulatory solution." Turner II, 520 U.S. at 213. Under that standard, "the Government may employ the means of its choosing "'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation,' and does not burden substantially more speech than necessary." Id. The court "will not invalidate the preferred remedial scheme because some alternative solution is marginally less intrusive on a speaker's First Amendment interests." Id. at 217-218.

Here, Congress has adopted a "regulatory solution" which promotes competition by creating parity in the copyright licensing schemes applicable to the cable and satellite industries, but does so in a manner designed to avoid any adverse effect on local broadcasters and their viewers. As we demonstrated in Point III.C. above, Congress' objectives would be achieved less effectively if the carriage provisions at issue here had not been incorporated into SHVIA's copyright licensing scheme. Indeed, the licensing scheme proposed by plaintiffs, which would include no carriage obligations of any kind, would not achieve parity in the federal government's treatment of cable and satellite operators, would not place either group on an

equal footing, and would include no mechanism whatsoever to prevent the new license from adversely affecting third parties, including local broadcasters and their viewers.

Similarly, to the degree that voluntarily assumed carriage obligations can be conceived of as a burden at all, SHVIA plainly does not "burden" substantially more speech than necessary to achieve Congress's objectives. As the Supreme Court explained in Turner II in analyzing whether the cable must-carry requirements burden substantially more speech than necessary:

> It is undisputed that broadcast stations gained carriage on 5,880 channels as a result of must-carry. While broadcast stations occupy another 30,006 cable channels nationwide, ... the vast majority of those channels would continue to be carried in the absence of any legal obligation to do so. The 5,880 channels occupied by added broadcasters represent the actual burden of the regulatory scheme. Appellants concede most of those stations would be dropped in the absence of must-carry, so the figure approximates the benefits of must-carry as well.
>
> Because the burden imposed by must-carry is congruent to the benefits it affords, we conclude must-carry is narrowly tailored to preserve a multiplicity of broadcast stations for the 40 percent of households without cable.

Turner II, 520 U.S. at 215-216.

The Court's reasoning in Turner II is equally applicable here. There are approximately 1,468 local broadcast television stations in 210 separate Designated Market Areas (DMAs) that are potentially eligible for carriage under SHVIA. Rohlfs Declar. (D. Ex. 3) ¶ 23, 90, and Appendix B. Of these 1,468 channels, plaintiffs have conceded that they would carry at least the top four stations in each market (or roughly 840 stations in 210 markets). Campbell Declar. (D. Ex. 10) ¶ 18; Schwimmer Declar. (D. Ex. 14) ¶ 19. The remaining 628 channels represent the maximum potential "burden" of SHVIA's carriage provisions. As plaintiffs concede that most of these stations would be dropped in the absence of a carriage obligation, 628 stations represents the maximum potential benefit of the carriage obligation as well – both in terms of achieving parity between the carriage burden of cable operators and satellite carriers in a given market and in preventing any harm to local broadcast stations. Because the "burden" imposed by SHVIA's carriage provision "is congruent to the benefits it affords," SHVIA is narrowly tailored to achieve both objectives.

SHVIA is narrowly tailored to achieve its objectives for other reasons as well. As the Supreme Court pointed out in Turner II, "'[t]he essence of narrow tailoring' is focus[ing] on the source of the evils the [Government] seeks to eliminate [without] significantly restricting a substantial quantity of speech that does not create the same evils." 520 U.S. at 216, quoting in part Ward v. Rock Against Racism, 491 U.S. at 799, n. 7. Under SHVIA, satellite carriers may choose on a market-by-market basis whether to invoke the benefits of the copyright license, and thereby incur a carriage obligation. Thus, the carriage obligations are triggered only in those markets in which the license is invoked. Put another way, the carriage obligations apply only in circumstances where use of the copyright license might otherwise have an adverse effect on local broadcasters, which is precisely the "evil" that Congress was seeking to prevent. In markets where satellite carriers choose not to invoke the benefits of the copyright license, and hence there is no risk of an adverse impact on local broadcasters, no carriage obligation applies.

Putting to one side the fact that SHVIA's carriage obligations in no way restrict speech that does not create the evils about which Congress was concerned, the fact of the matter is that SHVIA does not even "significantly restrict a substantial quantity of speech" at all. First, SHVIA does not, in any meaningful sense, limit plaintiffs' ability to retransmit local television programming. Quite to the contrary, the copyright license created by the statute provides an easier and more inexpensive way for plaintiffs to retransmit television broadcasts without paying any royalties to copyright owners and without obtaining individual copyright clearances. As a result Directv, which did not provide any local broadcast television service prior to the enactment of SHVIA now provides local broadcast television service to a total of 41 television markets. Deposition of David Baylor ("Baylor Dep.") (D. Ex. 15) at 41; Deposition of James Butterworth ("Butterworth Dep.") (D. Ex. 16) at 276.

REDACTED Similarly, Echostar, which provided limited local broadcast television service in 13 markets during the period before SHVIA was

enacted,[15] has now expanded service to 35 markets. Deposition of Michael Schwimmer ("Schwimmer Dep.") (D. Ex. 27) at 250-251; Deposition of Ed Petruzzelli ("Petruzzelli Dep.") (D. Ex. 26) at 39, 42.

Second, even if the carriage provisions incorporated in the statute were viewed in isolation without regard to the copyright license to which they are attached, plaintiffs are plainly wrong insofar as they allege that SHVIA operates "to prevent satellite carriers from extending local television programming over satellite systems to all but the largest media markets in the United States. Compl., ¶ 6. There are 210 Designated Market Areas (DMAs) in the United States. Rohlfs Declar. (D. Ex. 3) ¶22.

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[15] House Hearing (1999) (D. Ex. 95) at 33.

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For all of the above reasons, SHVIA does not restrict "substantially more speech than necessary" to achieve the objectives of the statute, and plaintiffs' First Amendment claims should be dismissed.

IV. SHVIA DOES NOT EFFECT A TAKING OF PLAINTIFFS' PROPERTY WITHOUT JUST COMPENSATION

Plaintiffs allege that SHVIA violates the Takings Clause of the Fifth Amendment because it "works a permanent physical occupation" of their real and personal property. Compl., ¶ 96. A permanent physical

invasion deprives an owner of the rights to "possess, use, and dispose" of the owner's property. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982), citing United States v. General Motors Corp., 323 U.S. 373, 378 (1945). Thus, the owner must have "no right to possess the occupied space himself" and "no power to exclude the occupier from possession and use of the space," the occupation must "forever den[y] the owner any power to control the use of the property," and the occupation "will ordinarily empty the right of any value." Loretto, 458 U.S. at 435-36.

Nothing in SHVIA remotely approaches a physical invasion of plaintiffs' property. SHVIA does not limit how plaintiffs may use their own property at all, and it allows them to use the property of others, a right which plaintiffs did not have before the statute was passed. The choice as to whether plaintiffs should use their property to carry broadcast signals rests entirely with plaintiffs. If plaintiffs decide to offer local service in a particular market, they lease space in a telephone switching center to establish a local collection facility to receive broadcast signals, encode them and send them along a telephone line to a broadcast center. Butterworth Dep. (D. Ex. 16) at 147-148. The "satellite carrier has the right to determine the location of the facility," and neither the government nor any television station has any possessory interest in that facility.[16]

SHVIA also does not even remotely approach the level of regulation needed to constitute a compensable taking of property. Regulatory takings frequently involve regulations that deny "all economically beneficial or productive use of land," Agins v. City of Tiburon, 447 U.S. 255, 260-61 (1980), see also Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), and embody the principle that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014 (1992), citing Pennsylvania Coal Co. v. Mahon, 260

[16] See "In the Matter of: Implementation of the Satellite Home Viewer Improvement Act of 1999; Broadcast Signal Carriage Issues, Retransmission Consent Issues," Report and Order, Federal Communications Commission, FCC 00-417, November 30, 2000 (hereinafter "SHVIA Report and Order") ¶¶ 45- 46.

U.S. 393, 415 (1922). In Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211 (1986), the Court identified three factors which have "particular significance" in deciding whether there has been a regulatory taking: (1) "the economic impact of the regulation on the claimant;" (2) "the extent to which the regulation has interfered with distinct, investment-backed expectations;" and (3) "the character of the governmental action." Id. at 224-225, quoting Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978); accord, MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 349 (1986). Here, as in Connolly , the government did "not physically invade or permanently appropriate" any of plaintiffs' property," and any interference with plaintiffs' property arose from "a public program that adjusts the benefits and burdens of economic life to promote the common good." Id. at 25.

With regard to the economic impact of SHVIA, the statute permits plaintiffs to impose an extra fee on satellite customers (over and above the normal monthly charge for satellite service). Echostar and Directv charge $4.99 and $5.99 per month, respectively, for local television service. Rohlfs Declar. (D. Ex. 3) ¶ 5.

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Finally, with regard to interference with "reasonable investment-backed expectations," the Fourth Circuit has held that "we can see absolutely no warrant for the proposition that where the government does not affirmatively prohibit the realization of investment-backed expectations, but merely refuses to enhance

the value of real property, a compensable taking has occurred." Front Royal and Warren County Industrial Park Corporation v. Town of Front Royal, Virginia, 135 F.3d 275, 285-286 (4th Cir. 1998). As stated above, SHVIA increases, rather than decreases, the potential uses of plaintiffs' property. What plaintiffs are essentially arguing is that the government has not enhanced the value of their property *enough*. In view of the enormous profits that plaintiffs will reap as a result of SHVIA, it functions as a "giving," rather than a "taking," of plaintiffs' property under the Fifth Amendment.

V. SHVIA IS FULLY CONSISTENT WITH DUE PROCESS REQUIREMENTS

Plaintiffs also allege that SHVIA violates the Due Process Clause of the Fifth Amendment by mandating a "transfer of private property from one person to another, without any substantial or legitimate public purpose." See Compl. ¶10; see also id., ¶¶ 69, 98-100. "Substantive due process . . . serves as an 'absolute check on certain governmental actions notwithstanding the fairness of the procedures' used to implement those actions." Front Royal, 135 F.3d 275 at 287-288, citing Love v. Peppersack, 47 F.3d 120, 122 (4th Cir. 1995). "[G]overnmental action offends substantive due process only where the resulting deprivation of life, liberty, or property is so unjust that no amount of fair procedure can rectify it." Front Royal, 135 F.3d at 288. To prevail on such a claim: (1) "the claimant must establish possession of a property interest," (2) "state action must deprive the claimant of the property interest," and (3) "the state's action must fall 'so far beyond the outer limits of legitimate government action that no process could cure the deficiency.'" Id., citing Sylvia Development Corp. v. Calvert County, Maryland, 48 F.3d 810, 827 (4th Cir. 1995).

For the reasons set out in Point IV above, SHVIA does not, as a matter of law, deprive plaintiffs of any interest in their property, whether real or personal. Plaintiffs are free to use their real property, facilities, satellites, and spectrum capacity just as they did before the statute was enacted. Furthermore, the voluntary copyright license created by SHVIA can, in no sense, be regarded as "so unjust that no amount of fair procedure can rectify it." Front Royal, 135 F.3d at 288. To the contrary, it makes available to

plaintiffs a valuable option they previously did not have. Nor is SHVIA even close to being "beyond the outer limits of legitimate government action." Id. As shown above, the purpose of this statutory provision is to promote competition in the multi-channel video programming marketplace in a manner which is consistent with the strong public interest in providing viewers with information from a variety of sources. H.R. Conf. Rep. No. 104-464 (D. Ex. 103) at 101 (1999). The Supreme Court has recognized that both objectives are not only well within "the outer limits of legitimate government action," Front Roval, 135 F.3d at 288, but important and substantial governmental interests. Turner I, 512 U.S. at 664. Because SHVIA legitimately seeks to "level the playing field" in the multi-channel video programming market between satellite carriers and cable operators, and because SHVIA does not deprive plaintiffs of any interests in their property, no violation of Due Process under the Fifth Amendment has occurred.

CONCLUSION

For the foregoing reasons, federal defendants' motion for summary judgment should be granted.

Dated: May 25, 2001

Respectfully submitted,

STUART E. SCHIFFER
Assistant Attorney General

HELEN F. FAHEY
United States Attorney

RICHARD PARKER
Assistant U.S. Attorney (VSB # 44751)

Joseph W. LoBue

THEODORE C. HIRT
JOSEPH W. LOBUE
HANNAH STIRES
DANIEL BENSING
U.S. Department of Justice
901 E Street, N.W., Room 1060
Washington, D.C. 20530
Telephone: (202) 514-4640
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that, on May 25, 2001, I caused a copy of the foregoing Federal Defendants' Motion For Summary Judgment, Memorandum In Support of Federal Defendants' Motion for Summary Judgment, Federal Defendants' Statement of Material Facts As To Which There Is No Genuine Issue, and a proposed Order, to be served by hand-delivery, on counsel for plaintiffs at the following address:

Charles J. Cooper
Michael Kirk
Robert J. Cynkar
Cooper & Kirk, PLLC
1500 K Street, N.W., Suite 200
Washington, D.C. 20005

and on counsel for defendant-intervenors at the following addresses:

Susan R. Podolsky
Donald B. Verrilli, Jr.
Nory Miller
Jenner & Block
601 Thirteenth Street, N.W.
Washington, D.C. 20005

George L. Washington, Jr.
Mark H. Lynch
Ellen P. Goodman
Mary N. Williams
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Joseph W. LoBue

JOSEPH W. LOBUE